Office-Supreme Court, U.S.
FILED
JUN 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1871

In the Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN E. HOLLY, PETITIONER

v.

ROBERT E. CHASEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. 1961 authorizes the assessment of interest on a judgment against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is reported at 639 F. 2d 795. The opinion of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1981 (Pet. App. 9a). On April 2, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to May 7, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December 1975, petitioner brought suit against respondents seeking to compel disclosure of certain agency records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Petitioner, a non-lawyer, represented himself before

the district court. Because his suit triggered the release of most of the disputed information, petitioner claimed that he was eligible to be compensated for his time under the attorneys' fees provision of the FOIA, 5 U.S.C. 552(a)(4)(E). The district court awarded petitioner $620 in "attorneys' fees." *Holly* v. *Acree*, 72 F.R.D. 115 (D.D.C. 1976). The government appealed only on the question whether the FOIA authorizes an award of attorneys' fees to a non-lawyer acting pro se, and the court of appeals affirmed. *Holly* v. *Chasen*, 569 F. 2d 160 (D.C. Cir. 1977).

Thereafter, petitioner asked the district court to order the government to pay post-judgment interest on his award of attorneys' fees. The court granted the request, observing that "28 U.S.C. § 1961 seems to apply in mandatory terms to all *judgments* rendered against private or governmental litigants in federal district courts" (Pet. App. 2a) (emphasis in original). The court of appeals reversed (*id.* at 3a-8a), finding that Section 1961 does not contain an express waiver of sovereign immunity—a prerequisite to an award of interest against the United States (Pet. App. 6a-7a).

ARGUMENT

Petitioner contends (Pet. 4-12) that 28 U.S.C. 1961 requires the assessment of interest against the United States. This contention is without merit.

This Court has repeatedly held that the United States is not liable for interest in the absence of an express waiver of sovereign immunity. See, *e.g.*, *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947). And, contrary to petitioner's contention (Pet. 5-6), this rule applies as well to interest imposed after the entry of a judgment. See *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654 (1947); *United States* v. *Sherman*, 98 U.S. 565 (1879); *Anglin & Stevenson* v. *United States*, 160 F. 2d 670, 672 (10th Cir.), cert. denied, 331 U.S. 834 (1947).

Indeed, in *New York Rayon*, the Court rejected the contention that the sovereign immunity of the United States does not extend to interest after a claim has been reduced to judgment, noting that the traditional rule preventing the taxation of interest against the United States "is a complete one covering all types of claims, including those arising out of pre-existing judgments." 329 U.S. at 661.

It is well established that a waiver of sovereign immunity must be "unequivocally expressed." *United States* v. *Testan*, 424 U.S. 392, 399 (1976); see also *United States* v. *New York Rayon Importing Co., supra*, 329 U.S. at 659. There can be little doubt that the court of appeals correctly held that the general language of 28 U.S.C. 1961 does not meet this test. The statute contains no affirmative terms that could constitute an express waiver of sovereign immunity and contains no indication whatsoever of an intent to include judgments against the United States.[1]

Moreover, the background of 28 U.S.C. 1961 demonstrates that Congress did not intend to waive the government's historic immunity from claims for interest. The statute was first enacted in 1842, and has remained substantially the same since. Act of Aug. 23, 1842, ch. 188, Section 8, 5 Stat. 518.[2] In 1842, persons with grievances against the

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[1]There is no merit to petitioner's suggestion (Pet. 4-5) that sovereign immunity cannot apply here because 28 U.S.C. 1961 contains no explicit exception for the United States. It is well settled that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). See also, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 224-225 (1957); *United States* v. *United Mine Workers*, 330 U.S. 258, 271-272 (1947). The same rule applies to a general statute imposing monetary liability, from which the sovereign is ordinarily immune.

[2]The wording of the statute was changed slightly in 1911, Act of Mar. 3, 1911, ch. 231, Section 291, 36 Stat. 1167, codified at 28 U.S.C. (1940 ed.) 811, and then again to its present form as 28 U.S.C. 1961.

United States could not file a lawsuit but could obtain relief only by means of a private bill in Congress. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1326 (2d ed. 1973) (hereinafter cited as *Hart & Wechsler*). Congress did not authorize the federal district courts to entertain suits against the United States until 1887, when it passed the Tucker Act, 28 U.S.C. 1491 (see Act of Mar. 3, 1887, ch. 359, Section 1, 24 Stat. 505). Clearly, Congress could not have contemplated that the general language of 28 U.S.C. 1961 would authorize the imposition of interest against the United States if a monetary judgment could not have been obtained against the United States when the statute was passed.[3]

Finally, as the court of appeals noted (Pet. App. 8a), Congress has enacted several specific statutes authorizing the payment of interest on judgments against the United States. See 28 U.S.C. 2411(b); 28 U.S.C. 2516(b); 31 U.S.C. 724a. See also 26 U.S.C. 7426; 28 U.S.C. 2411(a); 31 U.S.C. 227; 46 U.S.C. 743. Congress' enactment of these explicit provisions subsequent to the passage of 28 U.S.C. 1961 provides further evidence that it did not intend the general interest statute to apply to judgments against the United States.

For these reasons, the courts have uniformly rejected the contention that 28 U.S.C. 1961, or its predecessors, authorizes the imposition of interest against the United States.

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[3]As petitioner notes (Pet. 7), in a few "exceptional" instances Congress passed a private bill that did not grant the relief requested but rather authorized the claimant to bring a particular lawsuit in federal district court. *Hart & Wechsler, supra*, at 1326 n.2. These bills were so unusual that they can hardly have been a consideration in the passage of the predecessor to 28 U.S.C. 1961. Indeed, this Court has explicitly held that interest may not be assessed on a judgment against the United States resulting from a suit brought under such a private bill. *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41 (1928).

See *United States* v. *Sherman, supra; Richerson* v. *Jones*, 551 F. 2d 918, 925 (3d Cir. 1977); *Huntley* v. *Southern Oregon Sales*, 104 F. 2d 153, 154-155 (9th Cir. 1939); *Reed* v. *Howbert*, 77 F. 2d 227, 229 (10th Cir. 1935). Thus, the question presented here is one that has long been settled, and it does not warrant review by this Court. See Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1019-1020 n.6 (1955).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

DOJ-1981-06